

EMPLOYMENT APPEALS BOARD DECISION
2022-EAB-0025

Affirmed
Disqualification

PROCEDURAL HISTORY: On November 4, 2021, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged for misconduct and therefore was disqualified from receiving unemployment insurance benefits effective October 3, 2021 (decision # 83221). Claimant filed a timely request for hearing. On December 15, 2021, ALJ Messecar conducted a hearing, and on December 21, 2021 issued Order No. 21-UI-182351, affirming decision # 83221. On December 28, 2021, claimant filed an application for review with the Employment Appeals Board (EAB).

EVIDENTIARY MATTER: EAB has considered additional evidence when reaching this decision under OAR 471-041-0090(1) (May 13, 2019). The additional evidence is a copy of a letter prepared by claimant on or about October 5, 2021, that claimant submitted to her human resources section. The record shows that during the hearing it was the intent of both parties to admit the letter into evidence with neither party offering an objection to admission when asked. Transcript at 35. Although it appears that, per the ALJ's instructions, an attempt was made by claimant to timely fax the letter to the ALJ after the hearing, the letter was not received for reasons that are unknown.¹ As such, EAB has marked this additional evidence as EAB Exhibit 1, and a copy provided to the parties with this decision. Any party that objects to our admitting EAB Exhibit 1 must submit such objection to this office in writing, setting forth the basis of the objection in writing, within ten days of our mailing this decision. OAR 471-041-0090(2). Unless such objection is received and sustained, the exhibit will remain in the record.

WRITTEN ARGUMENT: EAB did not consider claimant's December 28, 2021 written argument when reaching this decision because she did not include a statement declaring that she provided a copy of her argument to the opposing party or parties as required by OAR 471-041-0080(2)(a) (May 13, 2019).

¹ Notably, the ALJ requested that both claimant and the employer submit a copy of the letter in an attempt to ensure that it was received for the ALJ's consideration. Transcript at 41.

Claimant's January 24, 2022 and January 25, 2022 written arguments contained information that was not part of the hearing record, and did not show that factors or circumstances beyond claimant's reasonable control prevented her from offering the information during the hearing. Under ORS 657.275(2) and OAR 471-041-0090 (May 13, 2019), EAB considered only information received into evidence at the hearing, as well as the contents of EAB Exhibit 1, when reaching this decision. EAB considered claimant's arguments to the extent they were based on the record.

FINDINGS OF FACT: (1) Lakefield Professional Group of Oregon, Inc. employed claimant as a veterinary technician (VT) from July 1, 2020 to October 8, 2021. As a VT, claimant's job responsibilities included supporting veterinarians as they administered care to the animals who were patients of the employer. The employer provided their VTs a two-hour lunch break to account for instances where the treatment of an animal might otherwise cut into a VTs scheduled lunch break if the lunch period were shorter.

(2) The employer maintained a policy that required their employees to "[be] humble and treat[] others with respect" while performing their job duties. Transcript at 17. As a corollary to this policy, VTs were expected, as a matter of common sense, to follow veterinarian instructions related to the treatment of animals. Claimant was aware of and understood these policies and expectations.

(3) On October 1, 2021, one of the employer's veterinarians asked a group of three VTs, which included claimant, to perform an EKG on a cat using a machine called a "cardio pet." Transcript at 29. Claimant believed that it was unnecessary to use the "fancy" cardio pet machine because the cat "was not clinical for heart disease . . . as far as [she knew]," because the employer was lightly staffed that day, and because claimant believed that a better course of action would be to send the cat to a cardiologist. EAB Exhibit 1 at 1. In addition, only one of the VTs, not claimant, had prior experience with the cardio pet and they were having difficulty getting the machine to work. Concerned that her coworker would miss their lunch break "if [they couldn't] get this [cardio pet] working soon," claimant said to the veterinarian, "hey, man... being that [the cat's] arrhythmia is only intermittent... what if we rescheduled [the cat's appointment or referred the cat to a cardiologist?]" EAB Exhibit 1 at 1. The veterinarian declined the suggestions and indicated that the group needed to get the cardio pet working and the test performed. Claimant responded to the veterinarian by throwing her hands in the air and stating in a loud, "snarky" tone, "whatever." Transcript at 7, 32. Claimant then left to take her lunch break while her coworkers continued to work on the cardio pet.

(4) Later that day, the veterinarian approached claimant to discuss what they viewed as claimant's earlier, "inappropriate" behavior including her questioning of the veterinarian's instructions for the treatment of the cat. Transcript at 7. Claimant told the veterinarian that she did not want to talk about the situation, but the veterinarian insisted due, in part, to the fact that their disagreement occurred in front of coworkers. Claimant agreed to discuss the incident. During the discussion, claimant expressed her frustration at the veterinarian's lack of awareness that their office was understaffed, and told the veterinarian that the way they practiced veterinary medicine drove claimant "bonkers," that the only thing that mattered to the veterinarian was what the veterinarian wanted, and called the veterinarian a "princess." Transcript at 9. The veterinarian was "really upset" by claimant's comments which they viewed as unprofessional "personal attacks" directed at the veterinarian's "character," and which questioned the veterinarian's medical treatment. Transcript at 14-15. The veterinarian reported the

incident to the hospital administrator. Claimant “didn’t love what came out of [her] mouth” during the conversation, but felt “forced . . . into a confrontation” by the veterinarian. Transcript at 22.

(5) Between October 4, 2021 and October 7, 2021, the employer investigated the incident with the hope that an avenue would become available to “remedy [the] relationship” between claimant and the veterinarian. Transcript at 10. As part of their investigation, the employer spoke with claimant and considered a letter claimant submitted where claimant expressed that she was glad the “air is being cleared” with respect to the veterinarian and that she had the ability “to speak [her] truth.” EAB Exhibit 1 at 1. During the interview, the employer asked claimant how she would prevent a similar situation from occurring in the future and claimant responded that she had no answer for that question. Claimant believed her actions toward the veterinarian did not violate the employer’s expectations and that her behavior fell within the employer’s core values “[a]s much as humanly possible,” but that she had been “like a volcano that blew.” Transcript at 11, 34.

(6) On October 8, 2021, the employer discharged claimant for her October 1, 2021 behavior toward the veterinarian, both in front of her coworkers and later in her meeting with the veterinarian, as well as her failure to show any “remorse or accountability” for her actions during her discussion with the veterinarian and the employer’s investigation that followed. Transcript at 10.

CONCLUSIONS AND REASONS: The employer discharged claimant for misconduct.

ORS 657.176(2)(a) requires a disqualification from unemployment insurance benefits if the employer discharged claimant for misconduct connected with work. “As used in ORS 657.176(2)(a) . . . a willful or wantonly negligent violation of the standards of behavior which an employer has the right to expect of an employee is misconduct. An act or series of actions that amount to a willful or wantonly negligent disregard of an employer's interest is misconduct.” OAR 471-030-0038(3)(a) (September 22, 2020). “[W]antonly negligent’ means indifference to the consequences of an act or series of actions, or a failure to act or a series of failures to act, where the individual acting or failing to act is conscious of his or her conduct and knew or should have known that his or her conduct would probably result in a violation of the standards of behavior which an employer has the right to expect of an employee.” OAR 471-030-0038(1)(c). In a discharge case, the employer has the burden to establish misconduct by a preponderance of evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

Isolated instances of poor judgment are not misconduct. OAR 471-030-0038(3)(b) (September 22, 2020). The following standards apply to determine whether an “isolated instance of poor judgment” occurred:

(A) The act must be isolated. The exercise of poor judgment must be a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent behavior.

(B) The act must involve judgment. A judgment is an evaluation resulting from discernment and comparison. Every conscious decision to take an action (to act or not to act) in the context of an employment relationship is a judgment for purposes of OAR 471-030-0038(3).

(C) The act must involve poor judgment. A decision to willfully violate an employer's reasonable standard of behavior is poor judgment. A conscious decision to take action that results in a wantonly negligent violation of an employer's reasonable standard of behavior is poor judgment. A conscious decision not to comply with an unreasonable employer policy is not misconduct.

(D) Acts that violate the law, acts that are tantamount to unlawful conduct, acts that create irreparable breaches of trust in the employment relationship or otherwise make a continued employment relationship impossible exceed mere poor judgment and do not fall within the exculpatory provisions of OAR 471-030-0038(3).

OAR 471-030-0038(1)(d).

The employer discharged claimant for the totality of her actions toward the veterinarian on October 1, 2021, and in the investigation that followed. These actions included claimant's decision to loudly question, in front of coworkers, the veterinarian's medicine; her unwillingness to assist with carrying out the veterinarian's treatment directives; her disrespectful behavior toward the veterinarian in calling her a "princess" whose medicine was "bonkers;" and her inability at any point to take responsibility, or show remorse, for her actions. The record shows that claimant's actions violated the employer's co-worker respect policy as well as their expectations that claimant carry out the medical instructions of the veterinarians they support; policies and expectations that claimant understood. Claimant violated the employer's policy on multiple occasions on October 1, 2021. First, claimant violated the employer's expectations when she openly disputed the instructions of the veterinarian that she assists with performance of a cardio pet test, then threw her hands in the air and loudly stated, "whatever," before exiting the room when the veterinarian did not implement her suggestion for an alternate course of action. Transcript at 7, 32. Later that day, claimant violated the policy a second time when during a conversation between the two she told the veterinarian that the way they practiced medicine drove claimant "bonkers," that the veterinarian was only concerned about their own needs, and then called the veterinarian a "princess." Transcript at 9.

Claimant knew at the time of her October 1, 2021 actions that it was her job to support the veterinarian in the provision of care to animals and to do so in a manner respectful to the veterinarian. By openly questioning the veterinarian's directions in front of her coworkers and then disrespectfully telling the veterinarian, "whatever", before leaving for her lunch break, claimant violated the employer's policy on respectful behavior and she knew or should have known that her actions violated the standards of behavior that the employer had a right to expect.

Likewise, by telling the veterinarian at a later meeting that the way they practiced medicine drove claimant "bonkers," and that the veterinarian was a "princess" only concerned with their own needs, claimant knew or should have known that her behavior would have been objectively viewed as disrespectful and therefore violated the reasonable expectations of the employer. Although claimant testified to her belief that she had remained within the employer's expectations at all times, claimant acknowledged at hearing that she "didn't love what came out of [her] mouth" on October 1, 2021, which, objectively speaking, reflected an understanding that she had crossed a line with her actions. The record shows that claimant was conscious of her conduct on October 1, 2021, indifferent to the

consequences of her actions that day, and that she disregarded, with wanton negligence, the interests of the employer.

Claimant's conduct is not excusable as an isolated instance of poor judgment because it exceeded mere poor judgment. Here, although the preponderance of the evidence shows that claimant's collective actions on October 1, 2021 constituted a single instance of poor judgment in the employment relationship, the totality of the circumstances, including claimant's demeanor in the investigation that followed, objectively demonstrate that her conduct that day made a continued employment relationship impossible. The record shows that claimant not only openly questioned the medical directions of the veterinarian she was tasked to support, but she also disrespected them in front of coworkers by throwing her hands in the air, saying "whatever" and then leaving the area for her lunch break while her coworkers followed the veterinarian's instructions. The record shows that despite the benefit of time that day to reflect upon the consequences of her earlier actions, claimant's conduct only worsened when she later met with the veterinarian to discuss her earlier actions. Claimant approached that conversation like a "volcano that blew" where instead of taking any responsibility for her earlier actions, or showing any remorse, claimant doubled down on her inappropriate conduct by engaging in additional disrespectful behavior towards the veterinarian, including name-calling. Finally, the record shows that during the employer's investigation of the October 1, 2021 incidents, including their discussion with claimant about her actions that day, claimant continued to demonstrate a "self-righteous" attitude, a lack of remorse or accountability for her actions, and an inability to show how she might act differently in future encounters with the veterinarian. Transcript at 10. Under these circumstances, a reasonable employer would conclude claimant's actions made a continued employment relationship impossible. Because claimant's actions exceeded mere poor judgment and cannot be excused as an isolated instance of poor judgment, claimant was discharged for misconduct and she is therefore disqualified from receiving unemployment insurance benefits effective October 3, 2021.

DECISION: Order No. 21-UI-182351 is affirmed.

D. Hettle and A. Steger-Bentz;
S. Alba, not participating.

DATE of Service: February 8, 2022

NOTE: You may appeal this decision by filing a Petition for Judicial Review with the Oregon Court of Appeals within 30 days of the date of service listed above. See ORS 657.282. For forms and information, you may write to the Oregon Court of Appeals, Records Section, 1163 State Street, Salem, Oregon 97310 or visit the Court of Appeals website at courts.oregon.gov. Once on the website, use the 'search' function to search for 'petition for judicial review employment appeals board'. A link to the forms and information will be among the search results.

Please help us improve our service by completing an online customer service survey. To complete the survey, please go to <https://www.surveygizmo.com/s3/5552642/EAB-Customer-Service-Survey>. You can access the survey using a computer, tablet, or smartphone. If you are unable to complete the survey online and need a paper copy of the survey, please contact our office.



Understanding Your Employment Appeals Board Decision

English

Attention – This decision affects your unemployment benefits. If you do not understand this decision, contact the Employment Appeals Board immediately. If you do not agree with this decision, you may file a Petition for Judicial Review with the Oregon Court of Appeals following the instructions written at the end of the decision.

Simplified Chinese

注意 – 本判決會影響您的失業救濟金。如果您不明白本判決，請立即聯繫就業上訴委員會。如果您不同意此判決，您可以按照該判決結尾所寫的說明，向俄勒岡州上訴法院提出司法複審申請。

Traditional Chinese

注意 – 本判決會影響您的失業救濟金。如果您不明白本判決，請立即聯繫就業上訴委員會。如果您不同意此判決，您可以按照該判決結尾所寫的說明，向俄勒岡州上訴法院提出司法複審申請。

Tagalog

Paalala – Nakakaapekto ang desisyong ito sa iyong mga benepisyo sa pagkawala ng trabaho. Kung hindi mo naiintindihan ang desisyong ito, makipag-ugnayan kaagad sa Lupon ng mga Apela sa Trabaho (Employment Appeals Board). Kung hindi ka sumasang-ayon sa desisyong ito, maaari kang maghain ng isang Petisyon sa Pagsusuri ng Hukuman (Petition for Judicial Review) sa Hukuman sa Paghahabol (Court of Appeals) ng Oregon na sinusunod ang mga tagubilin na nakasulat sa dulo ng desisyon.

Vietnamese

Chú ý - Quyết định này ảnh hưởng đến trợ cấp thất nghiệp của quý vị. Nếu quý vị không hiểu quyết định này, hãy liên lạc với Ban Kháng Cáo Việc Làm ngay lập tức. Nếu quý vị không đồng ý với quyết định này, quý vị có thể nộp Đơn Xin Tái Xét Tư Pháp với Tòa Kháng Cáo Oregon theo các hướng dẫn được viết ra ở cuối quyết định này.

Spanish

Atención – Esta decisión afecta sus beneficios de desempleo. Si no entiende esta decisión, comuníquese inmediatamente con la Junta de Apelaciones de Empleo. Si no está de acuerdo con esta decisión, puede presentar una Aplicación de Revisión Judicial ante el Tribunal de Apelaciones de Oregon siguiendo las instrucciones escritas al final de la decisión.

Russian

Внимание – Данное решение влияет на ваше пособие по безработице. Если решение Вам непонятно – немедленно обратитесь в Апелляционный Комитет по Трудоустройству. Если Вы не согласны с принятым решением, вы можете подать Ходатайство о Пересмотре Судебного Решения в Апелляционный Суд штата Орегон, следуя инструкциям, описанным в конце решения.

Khmer

ចំណុចសំខាន់ – សេចក្តីសម្រេចនេះមានផលប៉ះពាល់ដល់អត្ថប្រយោជន៍គ្មានការងារធ្វើរបស់លោកអ្នក។ ប្រសិនបើលោកអ្នកមិនយល់អំពីសេចក្តីសម្រេចនេះ សូមទាក់ទងគណៈកម្មការឧទ្ធរណ៍ការងារភ្លាមៗ។ ប្រសិនបើលោកអ្នកមិនយល់ស្របចំពោះសេចក្តីសម្រេចនេះទេ លោកអ្នកអាចដាក់ពាក្យប្តឹងសុំឲ្យមានការពិនិត្យរឿងក្តីឡើងវិញជាមួយតុលាការឧទ្ធរណ៍រដ្ឋ Oregon ដោយអនុវត្តតាមសេចក្តីណែនាំដែលសរសេរនៅខាងចុងបញ្ចប់នៃសេចក្តីសម្រេចនេះ។

Laotian

ເອົາໃຈໃສ່ – ຄຳຕັດສິນນີ້ມີຜົນກະທົບຕໍ່ກັບເງິນຊ່ວຍເຫຼືອການຫວ່າງງານຂອງທ່ານ. ຖ້າທ່ານບໍ່ເຂົ້າໃຈຄຳຕັດສິນນີ້, ກະລຸນາຕິດຕໍ່ຫາຄະນະກຳມະການອຸທອນການຈ້າງງານໃນທັນທີ. ຖ້າທ່ານບໍ່ເຫັນດີນຳຄຳຕັດສິນນີ້, ທ່ານສາມາດຍື່ນຄຳຮ້ອງຂໍການທົບທວນຄຳຕັດສິນນຳສານອຸທອນລັດ Oregon ໄດ້ ໂດຍປະຕິບັດຕາມຄຳແນະນຳທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄຳຕັດສິນນີ້.

Arabic

هذا القرار قد يؤثر على منحة البطالة الخاصة بك، إذا لم تفهم هذا القرار، إتصل بمجلس منازعات العمل فوراً، و إذا كنت لا توافق على هذا القرار، يمكنك رفع شكوى للمراجعة القانونية بمحكمة الإستئناف بأوريغون و ذلك بإتباع الإرشادات المدرجة أسفل القرار.

Farsi

توجه - این حکم بر مزایای بیکاری شما تاثیر می گذارد. اگر با این تصمیم موافق نیستید، بلافاصله با هیأت فرجام خواهی استخدام تماس بگیرید. اگر از این حکم رضایت ندارید، می‌توانید با استفاده از دستور العمل موجود در پایان آن، از دادگاه تجدید نظر اورگان درخواست تجدید نظر کنید.

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El Departamento de Empleo de Oregon es un programa que respeta la igualdad de oportunidades. Disponemos de servicios o ayudas auxiliares, formatos alternos y asistencia de idiomas para personas con discapacidades o conocimiento limitado del inglés, a pedido y sin costo.